



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 90 OF 2003

NARENDRA CHAGANLAL SOLANKI.....PLAINTIFF

VERSUS

NEEPU AUTO SPARES LTD & OTHERS.....DEFENDANTS

RULING

Introduction

The 1st, 2nd and 3rd Defendants/Applicants brought separate applications by way of Notices of Motion both dated 10th December, 2014. On 18th December, 2014, when the applications came up for *inter partes* hearing, this Court directed that the applications be consolidated and heard as one. In both their applications, the Applicants crave to pay the decretal sum in monthly instalments of Kshs. 45,000/- for the 1st Defendant, Kshs. 20,000/- for the 2nd Defendant and Kshs. 15,000/- for the 3rd Defendant. The application is predicated on averments contained in depositions sworn by the judgment debtors.

The Applicants are also asking for stay of execution of the decree herein pending the hearing and determination of this application.

The Applicants' Case

The gist of the motion is that the decretal sum of Kshs. 1,353,174.36/- is a substantial sum. The applicants aver that they have already paid Kshs 100,000/- to the decree holder and they remain committed to paying the debt in full but can only afford to pay the remainder in monthly instalments as outlined above.

The 1st Defendant's case is contained in the affidavit sworn by Mr. Dhaneswar Monji Pandya, one of its directors, sworn on 10th December 2014. Mr. Pandya disposes that the 1st Defendant's business has not been profitable and that in the year ended 2013, it only made a taxable income of Kshs. 160,000/- . As such it is not able to pay the decretal sum in a lump sum. Mr. Pandya also claims to be old and sickly and that he would suffer terminally should he be committed to civil jail.

The 2nd and 3rd defendants also swore affidavits. The 2nd defendant, in his affidavit sworn on 10th December 2014, claims that he does not draw any salary from the 1st defendant where he is a co-director and that his only source of income is his rental houses. He also asserts that he is aged and sickly but that he is willing to be paying monthly instalments of Kshs. 20,000/- as a sign that he is willing to pay off his debt.

The 3rd defendant avers in his affidavit sworn on 15th December 2014, that he draws a salary of Kshs.

50,000/- from the 1st defendant where he is also a co-director. That his father who is the 2nd defendant is sickly and he is thus forced to take care of his medical welfare. He is however willing to pay the decretal sum only that his means cannot enable him clear the sum all at once.

The Respondent's Case

The motion is contested. The plaintiff filed grounds of opposition on 16th December 2014 together with two replying affidavits sworn on 15th December 2014. In a nutshell, the plaintiff avers that the defendants have not shown sufficient cause to postpone payment of the decree, that their *bona fides* are doubtful because they have the means to pay and their only aim is to obstruct and delay the satisfaction of the decree and to compel the Court to abdicate its constitutional duties and obligations under Articles 159(2) (e) and 40(3) of the Constitution.

He stated further that the defendants' application is predicated on falsehoods and deliberate understatements of income.

Applicants/Defendants Submissions

Parties filed written submissions. The 1st defendant/Applicant in its submissions reiterates the contents of Mr. Pandya's affidavit and submits further that based on such a background, it has satisfied the law on requirements for the granting of the application. The 1st defendant also in his submission also disputes the decretal sum but the same is not pleaded in its application.

The 2nd and 3rd defendants/Applicants filed length submissions. It was submitted that the applicants have satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules which require that a party seeking stay of execution must demonstrate that

- a. Substantial loss may result to the applicant unless the order is made;*
- b. The application has been made without unreasonable delay, and;*
- c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant*

Counsel analysed the three requirements arguing that substantial loss would befall the defendants if stay of execution was not granted as it would mean that they would all be committed to civil jail which would be detrimental to their health and welfare seeing as they were old and sickly. On the issue of security, it is submitted that since costs was what was being contested, there was no need for security deposit. The defendants also argue that the application was brought without undue delay. The defendants rely on the cases of **Mukuma vs. Abuoga [1988] KLR 645** and **Tabro Transporters Ltd -VS- Absalom Dovaq Lumbasi (2012)eKLR**

On the issue of making payments on instalments, the 2nd and 3rd defendants have submitted at length. It is their argument that the defendants are willing to liquidate the decretal sum only that their financial capacity does not allow them to clear the sum all at ones. They argued that this Court has the discretion to allow the application. They have quoted the relevant law which is Order 21 Rule 12(1) and (2) of the Civil Procedure Rules which states as follows:

(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made

by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit”.

The 2nd and 3rd defendants have submitted further that, the onus of establishing sufficient cause rests on the applicant which they have done sufficiently. The defendants relied on **Jabali Alidina -VS- Lentura Alidina [1961] EA 565**

Plaintiff's Submissions

The plaintiff dismisses the defendants' submissions. On the issue of stay of Execution, the plaintiff has submitted that the defendants are seeking stay of execution of the whole decree as a way of frustrating him even after he had secured a judgment against them in this Court and in the Court of Appeal. He argues that the defendants had exploited all the available avenues but are still unwilling to transfer the suit property to him.

On payment in instalments, the plaintiff has submitted that although the Court has the discretion, the same should be exercised judiciously. Further that there is a need for the applicants to show sufficient cause which the defendants have failed to demonstrate. He has sought reliance on the **Alidina case** (supra).

The plaintiff further submits that the defendants' application is based on untruths. He has submitted that the income tax returns filed for the 1st defendant are fishy and cannot be relied on. This is because the 1st defendant has only disclosed to the Kenya Revenue Authority the sum of Kshs. 160,903 as its taxable income. The plaintiff has submitted that this is by any standards a paltry sum given that its aggregate turnover was a colossal Kshs. 32,466,676/-. How is it that the taxable income dropped to Kshs. 160,903/-? It is the plaintiff's view that there is a deliberate omission of its audited accounts which would reveal what preciously constituted the 1st defendant's overheads that amounted to Kshs. 32,305,773/-.

The plaintiff has urged the court to draw an unfavourable inference from the failure of the 1st defendant to tender crucial financial documents. Further that the defendants are guilty of material non-disclosure and thus their application is brought *mala fides*.

Courts Rendition

This court has discretion to postpone payment of a decree. But then the discretion is circumscribed. The applicant must demonstrate sufficient cause for indulgence. This discretion is enshrined under Order 21 rule 12(2) quoted above.

There must be a genuine and reasonable cause why the decree cannot be met immediately in full. If the judgment debtor is feigning impecuniosities or offers unreasonable instalment proposals, he will not merit an order for postponement of payment of the decree. Merely being hard pressed is not enough. Crawshaw J **Keshavji Jethabai & Brothers Limited Vs Saleh Abdulla [1959] E.A. 260 at 262** quoted with approval the case of **Sawatram Ramprasad Vs Imperial Bank of India (1933) AIR Nag. 330** wherein the court held as follows:

“It is laid down that the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt. We are in respectful agreement with this interpretation of the law but find great difficulty in construing the last observations in the ruling in the way desired by the counsel for the plaintiff, i.e. that prompt payment of a fair proportion of the debt is a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominating factor being of course the bona fides of debtor”.

The High Court of Tanganyika in **Alidina** adopted a definition of *sufficient cause* found in **Woodroffe and Ameer Ali on Civil Procedure Code 2nd Edition 869:**

“Sufficient reason – The existence of this will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once”.

In applying the laid out principles to this case, it is clear that, the defendants in their submission dispute the decretal sum but the same is not pleaded in their application. I therefore see no need of dealing further with the issue.

Secondly, it is obvious from the various affidavits sworn in support of the application that the 2nd and 3rd defendants are directors of the 1st defendant and they draw their income there from. The financial position of the three defendants would therefore be determined by the financial position of the 1st Defendant. In the affidavit sworn in support of the 1st Defendant's application, Mr. Pandya, states that the taxable income of the 1st defendant for the year ended 2013 was Kshs. 160,000/- . He annexed copies of the tax returns for the year ended 2013.

A look at the tax returns filed with Kenya Revenue Authority reveals that the gross turnover for the 1st defendant for the year ended 31st Dec 2013, is Kshs. 32, 466,676 and the taxable amount is Kshs. 160, 903/-. The 1st defendant has not annexed audited accounts to enable the court to make head or tail of how they arrived at Kshs. 160,903/- as the net profit. In any case, the decretal sum being money owing, should not be pegged on the net profit of the business but on the gross turnover which in this case is Kshs. 32,466,676/-. I do agree with the plaintiff that the defendants are not completely honest for if they were, they would have annexed copies of their audited accounts.

The 2nd and 3rd defendants argue that they do not have the means to pay the sum. It is the case for the 2nd defendant that he is sickly and does not draw a salary from the company. The 3rd defendant argues that he only draws a salary of Kshs. 50,000/- and takes care of his father who is the 2nd defendant. I would dismiss this argument on the ground that as stated, they are both directors of the 1st defendant and without its audited accounts it is not possible to tell how much money they earn from the company. A mere statement does not satisfy the requirement for disclosure of the defendant's financial position and cannot be taken to be the gospel truth.

The three defendants argue that they have demonstrated their *bona fides* by paying Kshs. 100,000/- to the plaintiff. However, The court in **Keshavji Jethabai(supra)** was very categorical that:

“...Each case has to be decided on its own merits, the predominating factor being of course the bona fides of the debtor”

and that the fact that the defendant is hard pressed is not a sufficient reason for granting instalments. In the present case, it is my view that though the defendants claim to be hard pressed and that they have paid Kshs. 100,000/- to demonstrate their bona fides, they have not substantiated their claims. It is my view that the defendants are guilty of non-disclosure and they cannot be heard to cry foul.

Under Order 22 rule 22, the court has discretion to order a stay of execution. The application seeks stay of execution of whole decree pending the determination of this application. It is not limited to the payment of the costs. This would appear to be a tactic to delay satisfaction of the whole decree which requires the defendants to transfer the suit property to the plaintiff.

For the foregoing reasons I do dismiss both applications dated 10-12-2014 with costs to the respondent.

Dated, signed and delivered at Kisumu this 20th day of April, 2015.

H.K. CHEMITEI

JUDGE